

THE  
C A S E  
BETWEEN

Edward Mellish, Merchant, Pl<sup>t</sup>. and Roger Williams,  
Master of a Ship, Def<sup>t</sup>. Concerning a Ship taken by the  
Dutch, An. Dom. 1673.

**A**BOUT the beginning of October, 1762. ( the Defendant *Williams* having been for several years before employed by the Plaintiff *Mellish*, as Master of the Ship *Valentine* of about 60 Tun ) *Mellish* then ordered him to prepare the said Ship for a Voyage from London to Faro, and thence back to London. The Ship being prepared accordingly, *Williams* got into the Downs by the 21. of October following, where, by *Mellish*'s Order he staid for Convoy, there being then War between England and Holland. About the 16. of December following, the Ship and Convoy were both driven into *Plimouth*, and being there, *Williams* by Letter informed *Mellish* thereof, whereupon *Mellish* sent *Williams* a proposal that instead of returning back again from Faro to London, he should go to *Newfoundland* for a Lading of Fish, and deliver the same to *Thomas Mellish* the Plaintiffs Factor at *O-Porto*, and that *Williams* should agree with Seamen at *Plimouth*, and Victual the Ship for that Voyage: all which was accordingly performed by *Williams*. And about the latter end of August, 1673. he arrived at *O-Porto*, and there delivered to *Thomas Mellish* the Plaintiffs Factor there, 1098 Kentall of Fish for the Plaintiffs Account, as appears by the Factors Deposition: This Fish was bought by *Williams* at 8 s. and 9 s. and 10 s. per Kentall, and at 11 s. the highest, and Fish that was brought later then *Williams* to *O-Porto*, was sold there at 5 Mill. 400 Rees, (which at 8 s. the Mill. as Money was there then, is at least 40 s. per Kentall) as appears by *Stui*'s Deposition, a Witness for the Plaintiff, so that if it was not the Factor's fault the Plaintiff might have got 25 s. per Kentall (allowing 4 s. per Kentall towards charges) which in all is 1372 Pounds. Before the Defendant's arrival at *O-Porto*, *Thomas Mellish* the Plaintiffs Factor at *O-Porto* had received Orders from the Plaintiff, that if the Defendant did not arrive at *O-Porto* time enough to make another Trip to the *Newfoundland* before Winter, and a good Freight offered, the Ship should be let to Freight for London; this appears by *Mellish*'s own Answer, fol. 28. whereupon the Seamen all judging the Ship unfit for another Voyage to *Newfoundland*, and the Ship not being discharged of her Lading of Fish at *O-Porto* till the 17. of September, the Factor let the Ship to Freight from *O-Porto* to London. At *O-Porto* some discourse happening about which would be the safest way to convey the Ship to London, some declaring it would be best to put into some Port of the West, but no Orders in writing were given to that purpose, whereupon the Ship being put to Sea from *O-Porto* to London, within three days after the Ship lost her Rudder, and when the Defendant entred the Channel the wind blew so cross that he could not possibly put into any Port of the West of England, which he would, gladly have done for his own safeguard if he could, for the danger they were in in case a Storm should arise, the Ship being unfound, and having lost her Rudder.

Thus failing to put into any Port in the West, *Williams* made the best of his way for London, but near *Beechy* a Dutch Man of War met him and took away the Ship, and turned him into a *Hamborough* Ship, which after put him ashore.

As soon as *Williams* got to London he came to Mr. *Mellish*, and acquainted him with the misfortune, but withall told him that he had hid about 600 Milrees, which in English Money is about 210 l. in so secure a place in the Ship that he thought the Dutch could not find it, and advised him to send to Holland to buy the said Ship for the Moneys sake, but *Mellish* answered the Dutch would discover by the Papers what Money was in the Ship, and would tear her in pieces but they would find it, but if *Williams* would go to Holland upon his own Charge and view the Ship, and if he found the Money was undiscovered, *Mellish* would then buy the Ship and pay *Williams* his Charges, else no purchase no pay. This was proved by Mr. *Chevers*, Mr. *Mellish*'s now Servant, and by the Deposition of Mr. *Rowland Hill*. *Mellish* thus refusing,

*Williams* not able to raise such a Stock himself, procured three Merchants to join with him in buying the Ship, which being done, the Money was found by one *Baldwyn Mathews* that was intrusted by them to buy the Ship, as appears by the Deposition of *Rowland Hill*, fol. 32. this Money divided amongst four, at the most came but to 52 l. 10 s. apiece: it is in proof that *Williams* had 200 Milrees of his own Money in the Ship, which at 7 s. the Milree is 70 l. then if a man would hide, in all probability he would hide his own. Notwithstanding this purchase *Williams* came short of his own Money 17 l. 10 s. when the Money was found, the Ship was refold, as appears by the Deposition of *Rowland Hill*; for *Williams* that knew her, judged her not worth the keeping; and he had declared to *Hill* before he went to buy her, that she could be made fit only for two or three *Newcastle* Voyages; as appears by *Hill's* Deposition.

Soon after the Seamen that had been hired by *Williams* for the Voyage, demand their Wages, till the discharge of the Ship of her Cargo at *O-Porto*, being till the 17. of September, 1673. which came to seven score pounds at least: some of them sued *Williams* and recovered, so he thought it no purpose to contend with the rest, but paid them also; as appears by several Deposition. *Mellish's* Conscience was such, that it was not loss enough for *Williams* to lose considerably in the Ship when taken, and his own Wages, but must also pay the other Seamen out of his own pocket, for which *Mellish* would make no Compensation; whereupon *Williams* sued *Mellish* in the Admiralty, and thereupon *Mellish* exhibits a long Bill in Chancery, pretended much money received by *Williams*, which he refused to account for, and to have the money found in the Ship restored to him, and to have satisfaction for breach of Orders by *Williams* in his Voyage, and some other pretences, by Colour whereof an Injunction was obtained till hearing, after four or five years delay. Upon hearing, my Lord Chancellor declared it must be referred to a Master to examine the Account, but that *Mellish* had no right to the money found in the Ship, neither in Law nor Equity; and for the pretended breach of Orders, *Mellish* might proceed at Law if he should be so advised: but if he proceeded not that Term which was *Easter-Term*, his Lordship would take it there was no Orders: these very words are entred into the Minutts; this was taken by *Mellish* for a Direction of my Lord Chancellor's for a Trial at Law, and was often urged to be so by Mr. *Collins* one of *Mellish's* Council, before the Lord Chief Justice *North*, but my Lord Chancellor hath since declared it not a Direction for a Tryal.

In *Easter Vacation* a Declaration was received by *Williams's* Solicitor, and the Term following *Williams* pleaded issuable Pleas to each part of the Declaration, and the Cause was set down to be tryed before the Lord Chief Justice *North*, the Sitting after *Trinity-Term* at *Guild-Hall*. But waving a Repetition of what Art was used by *Mellish* and his Agents for a *Special Jury*, and how by his Councils motions the Cause was put off no less than three times, for no other reason that the Defendant knows of, but because enough of his *Special Jury* did not appear. At length upon the 11. of November, 1679. the Defendant being then beyond Seas, the Cause came the third time to be heard at *Guild-Hall*, at which time Ten of this *Special Jury* appeared, viz. *John Buckworth*, *James Houblon*, *John Houblon*, *Robert Bretton*, *John Flavel*, *Benjamin Godfrey*, *Francis Wilsheer*, *Hugh Stroud*, *William Warren*, *William Gun*, and these were all Merchants. Two Talefmen, viz. *Humphrey Saterthwait* and *Thomas Hamond* were added that were not Mariners to make up this *Special Jury*. These being sworn, the Declaration, and the Defendants Pleas, and the Issues the Jury were to try, were truly and exactly opened by Mr. *Collins* the Plaintiffs Council, and it was to this effect, That the Plaintiff did declare for that the Defendant had broken the Plaintiffs and his Factors Orders in these three particulars, (to his damage of 2500 l.) First, for that the Defendant of his own negligence had taid so long at *Faro* that the Plaintiff lost the benefit of buying Fish at *Newfoundland*, as to this the Jury were so honest as to find for the Defendant according to the Evidence.

Secondly, For that the Defendant had refused to sail again from *O-Porto* to *Newfoundland* for another Lading of Fish, and from thence therewith to sail to *Lisbon*, To this the Defendant pleaded the said Ship was become so rotten and decayed by Sailing, and by the Storms of the Seas in the former Voyages, that at that time she was become unfit to perform that Voyage, and it was declared to them the Issue they were to try was whether or no the Ship was fit to perform the said Voyage from *O-Porto* to *Newfoundland*, and thence to *Lisbon*; and if they found she was fit, they were to find for the Plaintiff and give him his Damages, if they found that the Ship was unfit for that Voyage they were to find for the Defendant.

The Proofs touching this Issue on the Plaintiffs part were several Depositions to this effect, That some knew this Ship in 1672. at her departure from *London*, and that then she was a sound Ship, but the time she was to make her Voyage from *O-Porto* to *Newfoundland* was in September, 1673. so that could be no Evidence of the Ships soundness at *O-Porto* for a *Newfoundland* Voyage from thence.

Other Depositions were read to this purpose, That some had viewed the Ship at *O-Porto* the time in the Declaration mentioned, and say she might have been fitted, and had been fit in case repaired: not one says positively that she was fit; so that there was no Evidence that she was fit



fit for the *Newfoundland* Voyage, but what rather implied she was not fit for the Voyage. Some other Depositions were read, that the Defendant should say he was to be married as soon as he should come to *England*, and that they believed it was probable that for that reason he refused to go to *Newfoundland*, and Mr. *Dalawood* gave Evidence touching what profit the Ship *William* made in a Voyage to *Newfoundland*, and Mr. *Chevers* did prove Letters from *Plimouth*, and the discourse touching rebuying the Ship from the *Dutch*: and that was all the Evidence on the Plaintiffs part to that issue.

The Proofs touching this second Issue on the Defendants part were the Depositions of two Witnesses, and the Testimony of one in person; all three that had been Seamen in the Ship, in the Voyage from *Plimouth* and before, till she was taken, which was to this effect, That she was so leaky in coming from *Newfoundland* to *O-Porto*, that the Pump was constantly used, and that they were in much danger in the Voyage from *Newfoundland* to *O-Porto*, by reason of the Rottenness and ill Condition of the Ship, and that therefore the Defendant and all the Seamen judged her unfit for another *Newfoundland* Voyage, and that no Seaman that understood the Rottenness of the Ship would adventure his life in her another *Newfoundland* Voyage at any time, much less in Winter. *Robert Carr* swore, that this was declared to the Factor at *O-Porto* by the Seamen, and it was proved to the Jury, that this Ship lost her Rudder within three days after her departure from *O-Porto* for *London*. And the Deposition of *William Matthews* was read, whereby it appeared that soon after the Ship was taken after great charge in repairing her in *Holland*, she being set to Sea, was forced to put into *Dover* to be repaired again, which cost 55 l. 14 s. and again into the Isle of *Wight*, and in the Bay of *Cales* at *Pontole*, being brought in there to stop a Leak, her bottom gave way and the water flowed into her, so that she soon became full of water, and was adjudged to be irreparable, and was sold to be broke up: and for that reason that Deponent judged her unfit to make another Voyage for *Newfoundland*. Notwithstanding this, this *Special Jury* found for the Plaintiff, and gave him 100 l. damages, for not going from *O-Porto* to *Newfoundland* and thence to *Lisbon* in Winter time in such a Ship. Although the Defendant and the Seamen judged her unfit for a *Newfoundland* Voyage, yet they thought they might adventure in her from *O-Porto* to *London*, being inconsiderable in comparison of a *Newfoundland* Voyage, that to *London* being to be performed in about six or eight days with good Wind, but the other not to be performed under three Months time, and in far more dangerous Seas, it being then Winter, and thereupon the Ship was let to Freight to *London* by the Plaintiffs Factor, as aforesaid.

The third Breach of Orders declared for was, for that the Defendant (contrary to Directions given him by *Thomas Mellish* the Plaintiffs Factor at *Oporto*) did neglect and refuse to put in into some Port of the West of *England*, and fraudulently and maliciously did sail towards *London*, by reason whereof the Ship was taken by the *Dutch* and lost. To this the Defendant by Protestation saith that the said *Thomas Mellish* did not appoint the Defendant to put into any Port of the West, and for Plea said that the Ship had lost her Rudder before she came near any Port in the West of *England*, by reason whereof and the Wind blowing so cross and contrary to him, he could not put into any Port of the West, whereby he was forced to sail towards *London*, and before he could arrive there, the Ship and all her Lading was taken by the Enemy: whereupon the Issue was whether or no the Ship was so taken and lost through the Negligence of the Defendant. It was afterwards declared to the Jury that if they found it was through the Defendants Negligence she was taken, then they were to find for the Plaintiff, but if they found it was not through the Defendants Negligence she was taken, then they were to find for the Defendant.

As to the Protestation, it was alledged by the Defendant's Council, that the Orders for putting into the West, were but Verbal and not in Writing, and therefore not binding; the Bills of Lading being to deliver the Goods at *London*, one of which Bills of Lading was then produced by the Plaintiff, and there was no Proof that the Orders were in Writing, but only that *Thomas Mellish* the Plaintiffs Factor at *O-Porto* did Order the Defendant, and that some did hear him give the Defendant express Orders: therefore a man might have concluded that the third Issue ought to have been found for the Defendant for that reason only, if there had been no other; for there can be no Damages for not performing Orders that were not binding: and what doth the Factors Orders signify when he had hired the Ship to others?

On the Plaintiffs part touching the third Issue, were read the Depositions of *Peter Le Noble*, one that put Goods on board the Ship when she came from *O-Porto*, as appears by the same Deposition: he says he heard and verily believes the Defendant might have put into some Port in the West; but doth not say by whom he heard so, or what were his reasons for his belief. Some other Depositions were read to the same purpose, and that one did hear the Defendant say he would run to rights to *London*.

There was also read the Deposition of *Good*, which is in these words, that *Good* soon after the Defendant was taken, demanded of him why he did not put into some Port of the West of *England*? whereunto the Defendant replied, that the Wind being then strong Northerly he could

could not then put into any Port of the West of *England* with the Complainants Ship, unless he had turned her in, which the Defendant said he would not do, because he would not lose so much time, being he thought to obtain his passage into the *Downs*, without meeting any Enemy. Let any man judge if it had been prudence or safe, but manifestly dangerous to have attempted turning in against a strong Northerly Wind in an unsound Ship without a Rudder, as this was proved to be. Where then is any Evidence of Negligence in the Defendant? *Good* says further in the same Deposition, that the Defendant said he came up the Channel fair of the said Western Ports, but had named no Ports particularly in that Deposition) so near the Land that he saw the Ships riding at Anchor within the Road of *Portland*.

It doth not follow from this that the Defendant might have put in, for it is no strange thing that a Ship at Sea might come near a place and yet miss to come to it, especially the Wind being against her, as this Deposition imports, and the Ship being then disabled, and the Wind against her, as was proved.

The Deposition of *William Taylor* was also read on the Plaintiffs part, which imports that a Ship entering the Channel from the West of *England* coasting near the Shore with a fresh Northerly Wind might have put in into several Ports of the West, especially if the Ship came so near as to see the Ships riding at Anchor in the Port of *Plimouth*. But there was no Proof that the Defendants Ship was come in sight of *Plimouth*, or in those circumstances, but it is proved quite otherwise, that *Portland* was the first Land of *England* that was seen by the Seamen.

The Proofs on the Defendants part as to the third Issue are as follow. *Robert Carr* that was Boatwain in the Ship all along from the time she went from *Plimouth*, 1672. and before, till she was taken, did in person prove positively that the Ship lost her Rudder before she came near *England*, and the Wind blew North-East when the Ship was in the Soundings, and afterwards it blew so strong North and North-West, that they could not put into any Port of the West; and proved farther that the first Land of *England* they saw was *Portland*, and that they were driven by the Isle of *Wight* by night.

The Depositions of two other Witnesses were read, which affirmed that as the Wind then lay, they believed the Defendant could not put into any Port of the West. Others of the Seamen could not be produced at the Trial. Upon this fore-recited Evidence this *Special Jury* found as to the third Issue also for the Plaintiff and gave him 100 *l.* damages. So the whole damages upon both Issues are 200 *l.* besides Costs of Suit.

What should make this Jury do thus is to be wondred, unless they being Merchants, thought hereby to advantage themselves in way of Trade, by affrighting all Masters of Ships, and making them believe they must hazard their Lives in unsound Ships upon any sort of Voyage whatsoever, and that they must put into any Port they are appointed, though by unwarrantable Orders and against Wind, or else must answer damage to the Merchants.

*Now it is left to the common Judgment of the World, whether this Special Jury have done right in this Case or no, till the Party grieved can refer the Matter to more effectual Judgments.*

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